RECEIVED
NOV 22 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-5731

MICHAEL GENE BERRYHILL

Petitioner

vs.

STATE OF GEORGIA

Respondent

PETITION FOR WRIT OF CERTIORARI

C. Michael Abbott
Attorney for Petitioner

Suite 840
15 Peachtree Street, N.E.
Atlanta, Georgia 30303

(404) 656-5502

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No.

MICHAEL GENE BERRYHILL :

Petitioner :

vs. :

STATE OF GEORGIA :

Respondent :

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on October 28, 1975 which affirmed his conviction and sentence of death.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 235 Ga. 549 (1975) and is reproduced in Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on October 28, 1975. A timely petition for rehearing was denied on November 24, 1975. The jurisdiction of the Court is invoked under 28 USC. §1257 (3).*

---

*For reasons that are unclear to petitioner's present attorney, petitioner's previous attorney, Mr. William T. Elsey of Cartersville, Georgia, failed to file a timely petition for certiorari to this Court. Further, it should be reported that subsequent to the trial of petitioner, Mr. Elsey became a special prosecutor in the case against petitioner's co-defendant and, in fact, cross-examined petitioner, his former client, in the trial of the co-defendant (see Appendix B). Counsel for petitioner can only suggest that this amazing turn of events is suggestive of Mr. Elsey's allegiance to petitioner and a possible explanation for his failure to file a timely petition.

The untimely filing of a petition for certiorari seeking review of a criminal conviction from the highest court of a state is not a jurisdictional defect. Heflin v. United States, 358 U.S. 415, 418 n.7 (1959); Taglianetti v. United States, 394 U.S. 316, n.1 (1969). The Court has frequently granted certiorari in state criminal cases where the petition was out-of-time under Rule 22(1). See e.g. Fuller v. Alaska, 393 U.S. 80 (1968). Further, the record here strongly suggests that this case demands review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions from the Constitution of the State of Georgia of 1945, Title 2 of the Code of Georgia:

2-104 Paragraph IV. Right to the courts

No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both.

2-105 Paragraph V. Benefit of counsel; accusation; list of witnesses; compulsory process; trial by jury

Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel; shall be furnished, on demand, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded; shall have compulsory process to obtain the testimony of his own witnesses; shall be confronted with the witnesses testifying against him; and shall have a public and speedy trial by an impartial jury.

QUESTIONS PRESENTED

I. Whether petitioner was denied his right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution where, in a capital case,

   a. During the penalty phase of the jury's deliberation, there was communication between judge and jury without defendant or his counsel either present or aware of this occurrence until after the trial, and,

   b. a reasonable man could assume prejudice to the defendant as a result of that communication, and,

   c. the inadequacy of the record is such that a contrary conclusion of harmless error is not possible.

II. Whether petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution under the circumstances set forth in issue one?

III. Whether petitioner was denied his right to confrontation, his right to defend his own cause and his right to due process of law under the Georgia Constitution under the circumstances set forth in issue one?

STATEMENT OF FACTS

Michael Gene Berryhill was convicted of felony murder and armed robbery by a jury in Bartow County, Georgia, on January 9, 1975. He received the death sentence for the felony murder and life imprisonment for the armed robbery. His sentence was affirmed by the Supreme Court of Georgia on October 28, 1975 and a timely petition for rehearing was denied on November 24, 1975.

The crime itself was of a heinous nature. Petitioner Berryhill had been addicted to sniffing airplane glue since the age of thirteen and has a long history of psychological problems.

During the penalty phase of the trial, after petitioner had been found guilty, the jury inquired of the judge through the bailiff whether they could sentence the defendant to a life sentence without any possibility of parole. The trial judge's response to the jury, again through the bailiff, was, "Tell the jury I could not answer that question." (Record at 56, 57 and 58 reproduced in Appendix C). Neither the defendant nor his counsel were aware that this communication had taken place until after the trial.

REASONS FOR GRANTING THE WRIT

DEFENDANT WAS GIVEN A SENTENCE OF DEATH UNDER CIRCUMSTANCES WHICH DENIED HIS RIGHT OF CONFRONTATION AND RIGHT TO DUE PROCESS OF LAW BECAUSE OF A PRESUMPTIVELY PREJUDICIAL COMMUNICATION BETWEEN JUDGE AND JURY OF WHICH NEITHER DEFENDANT NOR HIS ATTORNEY WERE AWARE UNTIL AFTER THE TRIAL. FURTHER, THE INADEQUACY OF THE RECORD ON THIS MATTER REQUIRES AN ASSUMPTION OF PREJUDICE TO THE DEFENDANT.

I. Defendant Has a Right to be Present at Every Stage of His Trial.

One of the most basic of the rights guaranteed defendants in a criminal trial is the right to be present at every stage. See, e.g., Lewis v. United States, 146 U.S. 370 (1892); Snyder v. Massachusetts, 291 U.S. 97 (1934), overruled on other grounds, Malloy v. Hogan, 378 U.S. 1 (1964); Illinois v. Allen, 397 U.S. 337 (1970).

This right derives both from the Sixth Amendment right of confrontation, Lewis v. United States, 146 U.S. 370 (1892); Illinois v. Allen, 397 U.S. 337 (1970) made obligatory upon the States by this Court, Pointer v. Texas, 380 U.S. 400 (1965), and independently from the due process clause of the Fourteenth Amendment. Snyder v. Massachusetts, 291 U.S. 97 (1934); overruled on other grounds, Malloy v. Hogan, 378 U.S. 1 (1964).[1/]

There has long been a strict application of the rules safeguarding the defendant's right to be present at every stage of trial. This is true in the Supreme Court of Georgia, Hopson v. State, 116 Ga. 90 (1902); Bonner v. State, 67 Ga. 510 (1881), as well as in the Supreme Court of the United States. Rogers v. United States, 422 U.S. 35 (1975); Shields v. United States, 273 U.S. 583 (1927).

II. The Ex Parte Communication Between Judge and Jury During the Penalty Phase of a Capital Case was Presumptively Prejudicial.

According to Snyder, the test of whether an ex parte communication may be prejudicial to the defendant under the due process clause of the Fourteenth Amendment has to do with the relationship between the defendant's presence and his opportunity to defend:

1/ In Snyder, this Court noted a distinction between the privilege of presence at the trial and the privilege of confrontation, the latter privilege arguably limited to stages of the trial at which there are witnesses to be questioned. Snyder, 291 U.S. at 107.

> We assume in aid of the petitioner that in a prosecution for felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. (Cardozo, J.)

Snyder, 291 U.S. at 105-06.[2/]

The significance of an ex parte communication between judge and jury during the penalty phase of a capital case does not require extended argument. The importance of both defendant and his counsel to this situation has a substantial relation to the opportunity to defend against the charge. Rogers v. United States, 422 U.S. 35 (1975). The potential for suggestibility during the jury's deliberations is obvious; the potential for harm, clear. During a jury deliberation much of the chaff in any case may have been already discarded; the jury is likely to be reacting to a narrow and focused concern manifested by their inquiry. Such ex parte judge-jury communications are thus crucial, by definition, because of the doubt which has prompted the inquiry on behalf of the jurors and any advice given must be handled with the greatest of care to ensure fundamental fairness to the accused.

The argument in this case is not whether there was error but whether the error that was committed can be characterized as "harmless". The black-letter law is not disputed:

> [T]he orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.

Rogers v. United States, 422 U.S. 35, 38 (1975), citing Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81 (1919).

2/ "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Snyder, 291 U.S. at 107-08.

Here, there was an ex parte communication between judge and jury in the absence and without the knowledge of either the defendant or his counsel. Berryhill v. State, 235 Ga. 549, 554 (1975). Here, as in Rogers, "the communication from the jury in this case was tantamount to a request for further instructions." See Rogers, 422 U.S. at 39. The jury wanted to know "if they could sentence appellant to a life sentence without any possibility of parole?" Berryhill, 235 Ga. at 554.

The proper course in such a situation has been previously noted in both Georgia and Supreme Court cases:

> Where a jury has retired to consider its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object.

Shields v. United States, 273 U.S. 583, 588 (1927).[3/]

3/ Cf. Berryhill v. State, 235 Ga. 549, 557-58 (dissenting opinion); Thacker v. State, 226 Ga. 170, 185-86 (1970) (dissenting opinion). As the dissenting justice noted in Thacker,

> "the proper procedure would have been for the jury to communicate with the judge only, to advise him that it had a question to propound to him and for the court to call the jury back into the box and inquire of them what its question was, and then to make whatever remarks he thought to be appropriate, all in the presence of the jury, the accused and public attending the trial. This requirement is at the top among priorities in the State's public policy in the guarantee against star chamber proceedings in a trial involving a man's life or liberty. It matters not that the subject matter of the communication is known. The next time it may not be known and could be devastatingly harmful. This kind of thing should be stopped at the threshold the minute it comes to light. To condone what was done in this case would open the doors to the worst kinds of abuses, both intentional and through honest misunderstandings." Ibid.

The Thacker case was one of the two relied upon by the Supreme Court of Georgia in ruling against petitioner on this issue. Berryhill, 235 Ga. at 554. Thacker is distinguishable, however, in that counsel was present and informed of the communication before the verdict was rendered and did not object. The Court thus held that he waived objection. Thacker, 226 Ga. at 181. Further, there was no substance to the communication from judge to jury and thus, unlike the situation here, no suggested inference as to its meaning. Ibid. In Leverette v. State, 104 Ga. App. 743 (1961), the second case relied upon by the Georgia Supreme Court, the judge told the jury in response to a question concerning minimum sentence served and parole, "The court can't answer that question; the law won't permit the court to discuss that with the jury." Ibid. The opinion does not reveal whether counsel was informed of this discussion before the verdict, nor is there any suggestion as to how it may have harmed the defendant. In short, it is not this case.

It is a matter of record that this procedure was not followed in the instant case, thus giving rise to error. Berryhill, 235 Ga. at 554. The question here thus becomes whether the error can be considered "harmless". Cf., Rogers, 422 U.S. at 40. As the Eighth Circuit has noted, "a presumption of prejudice arises from a court's instructing the jury outside the presence of the defendant, but . . . the presumption 'in some instances may be overcome by evidence giving a clear indication of lack of prejudice.'" United States v. Mesteth, 528 F.2d 333, 335 (8th Cir. 1976), citing Rice v. United States, 356 F.2d 709, 717 (8th Cir. 1966). The Second and Sixth circuits also indicate that the burden of showing that the error is harmless rests with the state once it is shown that a secret communication was given:

> The giving of a secret instruction has been held reversible error unless 'it appears with certainty that no harm has been done ...', United States v. Compagna, 146 F.2d 524, 528 (2d Cir. 1944), cert. denied, 324 U.S. 867, 65 S. Ct. 912, 89 L.Ed. 1422 (1945).

Petrycki v. Youngstown & Northern R.R., 531 F.2d 1363, 1368 (6th Cir. 1976). Thus, in the instant case, the ex parte communication between judge and jury during the penalty phase of a capital case was presumptively prejudicial.

III. The Error Was Not Harmless

A. The Nature of the Information Conveyed to the Jury Was Not Harmless. A Reasonable Man Could Have Inferred A Negative Inference From the Response Given to the Jury.

As this Court suggested in Rogers v. United States, 422 U.S. 35 (1975), crucial to any inquiry regarding harmless error are "the nature of the information conveyed to the jury, in addition to the manner in which it is conveyed." Rogers, 422 U.S. at 40. Here, the question propounded to the judge was whether the jury could sentence petitioner to a life sentence without any possibility of parole. Berryhill, 235 Ga. at 554.

Thus, it is clear from the facts we do know that the life-death issue was the subject of the communication itself and obviously was the concern of the jury at the time. The "nature of the information conveyed" to the jury was, "Tell the jury I could not answer that question." Berryhill, 235 Ga. at 557 (dissenting opinion), cf., Appendix at C-3.

Justice Hill of the Georgia Supreme Court, joined by Justices Gunter and Ingram, viewed the matter this way:

> It is clear that one or more jurors were not persuaded that the death penalty should be inflicted. The trial court's ex parte response to the bailiff to be communicated to the jury was "Tell the jury I could not answer that question." The effect of this response was to inform the jury that the court could not give a "yes" answer to the question.

Id. at 557-58 (dissenting opinion) (emphasis supplied).[4/]

If three Justices of the Supreme Court of Georgia can assume a negative inference from the instruction given, it seems safe to suggest that other reasonable men, including the jurors in question, might do likewise. It thus follows that the response to the juror's question, whether intended as an instruction or not, may well have had that effect and cannot be conclusively presumed to be harmless. As the dissenting justices noted:

> The trial judge's response to the jury, in addition to the fact that it should have been made in open court in the presence of the defendant and his counsel, should have included the admonition that the jury had been instructed as to those factors which they should and could consider in deciding whether to sentence the defendant to death or to life in prison, and that the jury should make that determination according to the instructions given them in charge and without regard to matters not referred to in the charge.
>
> That is to say, the jury should have been admonished to choose between life and death according to law, without regard to extraneous matters. By being deprived of the right to be present, the defense was denied the opportunity to request the proper response to the jury's question.

Berryhill, 235 Ga. at 557-58 (dissenting opinion) (emphasis supplied). Thus, it is not unreasonable to assume that the trial judge, by negative implication, answered the juror's question. In so doing, he committed reversible error.

4/ The fact that the trial judge stated "that" question is also confusing. A juror might be likely to believe it is only "that" question that is objectionable. It is precisely this kind of speculation that could have been avoided had the proper procedure been followed.

B. The Manner in Which the Information Was Conveyed to the Jury Was Not Harmless. The Record Here Is So Inadequate As To Require An Assumption of Prejudice to the Defendant.

The "manner in which the information was conveyed" to the jury is in large part unrecorded. Apparently, the response to and from the judge was oral and not written. The following points should also be noted: 1) The defendant was not present during the judge-jury communication and was not aware of it until after the trial; 2) the defendant's counsel was also not present during the judge-jury communication and was not aware of it until after the trial; 3) there is no verbatim record of what was said, either from juror-to-bailiff-to-judge or in the reverse sequence, as there is no sworn testimony from any of the principals; 4) the record reveals nothing of the time-frame, such as what time the communication occurred, how long the jury had been deliberating or how soon after the communication the verdict came in.

Thus, the record of this judge-jury communication on a life and death issue is almost barren and clearly inadequate. The decision as to whether this record contains error which will in turn determine whether Michael Berryhill will live or will die should not hang by so slender a thread if "fundamental fairness" is to have any meaning for this defendant.

Because of the inadequacy of the record, it is not hyperbole to say that it is literally impossible to state with any certainty that no harm was done. As the Sixth Circuit recently held:

> Even though the appellant has not been able to demonstrate prejudice in the present case, the total absence of a record of the proceedings in which the changes in the makeup of the jury occurred requires us to assume prejudice.

United States v. Gay, 522 F.2d 429, 435 (6th Cir. 1975) (emphasis

supplied).[4]

A similar result was reached in a recent civil case:

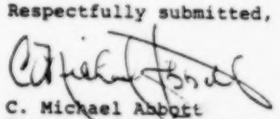
> Because we cannot say with certainty that no harm was done in this case by the correspondance between the court and the jury, with counsel absent, we must reverse and remand for a new trial.

Petrycki v. Youngstown & Northern R.R., 531 F.2d 1363, 1368 (6th Cir. 1976).[5] The only difference in this case is that a human life lies in the balance.

CONCLUSION

Because the communication between the trial judge and jury was error that is presumptively prejudicial and the record is sufficiently inadequate that one cannot presume harmless error, petition prays that the writ of certiorari be granted.

Respectfully submitted,



C. Michael Abbott
Attorney for Petitioner

Suite 840
15 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 656-5502

4/ (It was error for judge to engage in discussions with members of jury after it had been impaneled and to consider request for excuses out of the presence of defendant and without giving notice to defense counsel.)

5/ (Where trial court, without prior notice to counsel, stated in reply to jury inquiry during deliberations that jury could award damages only up to amount demanded by plaintiff in ad damnum clause of complaint, trial court committed prejudicial error in absence of any evidence to contrary.)